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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-389, 74-428

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioners,

v.

JOSEPH P. MOODY, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, AS AMICUS CURIAE

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MOTION OF THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Society for Personnel Administration (ASPA) hereby moves this Honorable Court, pursuant to Supreme Court Rule 42(3), for leave to file a brief as amicus curiae in this case. ASPA is the nation's largest human resources management association representing almost 15,000 personnel and industrial relations executives working in business, government and education. ASPA is dedicated to the advancement of personnel and industrial relations management in the United States and in twenty-six foreign countries. ASPA is, of course, vitally interested in the procedures used to choose qualified applicants for employment, and has maintained a close involvement in the development of federal

standards which seek to assure nondiscrimination in these procedures. For example, on August 23, 1973, the Equal Employment Opportunity Coordinating Council (EEOCC)[1] issued draft "Proposed Uniform Guidelines on Employee Selection" which, in the view of many, including personnel administrators and industrial psychologists, was unworkable and technically unsound. ASPA, together with other public and private groups, sought to articulate the various concerns, and to offer constructive alternative approaches whenever possible.

As set forth more fully in pages 1 to 4 of the attached amicus brief, ASPA believes that properly developed and utilized employment tests serve both the purposes of efficient personnel selection and the objectives of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ASPA is concerned that administrative and judicial interpretations of this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which have required test validation in strict conformity with the Equal Employment Opportunity Commission (EEOC) Guidelines on Employee Selection Procedures, 29 CFR § 1607 *et seq.* (1970), will deter employers from using objective tests. Rather than face unnecessarily stringent validation requirements, employers may turn to more subjective procedures, or to some form of quota-based system. Either result would subordinate the selection of employees on the basis of qualifications, which this Court recognized as "the very purpose of Title VII. . . ." 401 U.S. at 434.

It is because of these concerns that ASPA seeks to submit the attached amicus brief for the Court's con-

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[1] EEOCC was established by the 1972 Amendments to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), P.L. 92-261, 86 Stat. 103, in order to coordinate federal policy on employment discrimination. *See* 118 Cong. Rec. S. 577 (daily ed., Jan. 26, 1972).

sideration. It was prepared on behalf of ASPA by a technical subcommittee of industrial psychologists and represents the views of these practicing professionals. ASPA hopes that its experience in personnel administration and with the development of federal testing guidelines, as well as the expertise of its subcommittee, will be of assistance to the Court in its resolution of the present case.

The views expressed in the brief are intended to assist the Court by providing a clear and concise summary of recent developments in the area of validation of professionally developed tests and other objective employee selection techniques. ASPA takes no position on the issue of back pay, or any other issue unrelated to testing and employee selection which may be considered in this case. Although ASPA recognizes that its views may reflect on the positions of the parties, it neither endorses nor challenges the argument of either party and expresses no opinion as to the ultimate resolution of the merits of this case.

For these reasons, the American Society for Personnel Administration respectfully requests leave to file a brief as amicus curiae in the present case.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

The interest of the American Society for Personnel Administration (hereinafter "ASPA") is set forth in the foregoing Motion to File a Brief as Amicus Curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

As noted above,[1] ASPA's request to participate in this case is based on its concern regarding the administrative and judicial interpretations being given to this Court's decision in *Griggs* v. *Duke Power Company*, 401 U.S.

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[1] *See* Motion for Leave to File a Brief as Amicus Curiae, at pp. II-III.

424 (1971). Specifically, a number of courts have construed the Equal Employment Opportunity Commission (EEOC) Guidelines on Employee Selection Procedures, 29 CFR § 1607 *et seq.* (1970), as rigid procedures which must be complied with in every validation study, if the study is to be viewed as an adequate demonstration that a test is "job-related" within the meaning of *Griggs*. As the requirements for complex, expensive and time-consuming validation research for tests[2] increase—requirements which even expert industrial psychologists may not be able to satisfy—many employers confront mounting pressures to abandon the use of professionally developed tests and other objective employee selection mechanisms and resort to quota-oriented or other arbitrary hiring systems.

This result would be inconsistent not only with the efficient selection of qualified employees, but also with the spirit of Title VII,[3] which, as this Court recognized in *Griggs*, requires the selection of employees on the basis of qualifications:

> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant. 401 U.S. at 436.

ASPA believes that properly developed and utilized tests are the best means of implementing this basic pur-

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[2] Throughout this brief, the term "test" will be used to refer to professionally developed ability tests, rather than the omnibus definition of the term "test" contained in the EEOC Guidelines, which would seem to include selection mechanisms such as seniority, medical examinations, training, reference checks, and prior experience. However, the Court's resolution of the present case, unless qualified, may well be construed as applying to all such selection mechanisms.

[3] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

pose in many employment contexts. Tests and other objective selection devices are the very heart of a workable merit opportunity system in which qualifications are the paramount factor in hiring and promotion. Even where objective tests have been validated [4] under less than ideal circumstances, they are far superior to the more widely used selection devices such as unstructured interviews or job application reviews. Tests provide three distinct advantages over less disciplined alternatives: they are *standardized* (*i.e.*, every examinee is given the same instructions, the same tasks to do, and the same time limits), they are *efficient* (*i.e.*, they allow a considerable amount of information about a person to be collected in a short period of time), and they are *amenable to objective analysis* (*i.e.*, tests results may be quantified and subjected to statistical evaluation).

While ASPA strongly endorses the value of tests as vehicles for the advancement of equal employment opportunity, it recognizes that there must be some mechanism for reviewing the use of a test in order to assure consistency with the objectives of Title VII. ASPA also recognizes that guidelines and regulations must be promulgated by the enforcing agencies to promote enlightened and uniform interpretation of the law. In the area of testing and test validation, which is highly complex, there is a particularly urgent need for such an interpretation of the Act, but this uniformity must not be allowed to become so rigid as to restrict the flexibility and adaptability necessary to the test validation process. Testing guidelines must be recognized as theoretical or ideal models which cannot always be fol-

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[4] In the context of employment testing, "validity" and "job-relatedness" are synonymous. For a test to be considered valid, it must support the inference that those who score higher are likely to perform the job in question better than those who score lower; *i.e.*, that test performance is related to job performance.

lowed in practice.[5] If they are applied as a rigid checklist, as several courts have applied the existing Guidelines, validation studies[6] will be rendered impractical and the use of valid tests will be discouraged. Given this situation, this Court's guidance is essential in order to establish the framework in which the adequacy of test validation efforts is to be measured by reviewing courts and agencies.

This brief seeks to highlight certain interpretations of *Griggs* which have produced unworkable or unnecessary requirements for test validation. It then points out some of the practical limitations on test validation which should be borne in mind when considering the adequacy of any validation study, and suggests broad principles which may be applied by reviewing courts in assuring that employment tests are "job-related" without creating pressure for the abandonment of valid tests.

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[5] The conduct of a validation study, simply stated, is the process of investigation and research aimed at determining whether or not the use of a test validly accomplishes that which it is intended to do.

[6] Even the exhaustive "Standards for Educational and Psychological Tests," published by the American Psychological Association, Washington, D.C. (1974 ed.) [hereinafter "APA Standards (1974)"], caution that:

> "Manuals can never give all the information, and test users can never follow all the procedures that might be desirable. . .
>
> ". . . Any test or testing situation may present some unique problems; it is undesirable for the standards to be treated as unduly rigid. . . . The Essential standards indicate what information or practices will be needed for most tests in most applications. When a test developer or test user fails to satisfy these requirements, he should do so only as a considered judgment. In any single test or testing situation, there may be some Essential standards that do not apply. *Id.* at 6.

The 1974 APA Standards replaced the APA's "Standards For Educational and Psychological Tests and Manuals" (1966).

ARGUMENT

I. This Case Will Call Upon the Court to Amplify Its Decision in *Griggs* v. *Duke Power Company*

A. *The Griggs Decision*

In its landmark decision in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971), this Court for the first time considered the effect of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* on the use of professionally developed ability tests to select employees. Duke Power Company had utilized two professionally developed tests [7] to select new employees, but it apparently never argued that the tests were "directed or intended to measure the ability to learn to perform a particular job or category of jobs." *See* 401 U.S. at 428. Rather than being adopted on the basis of a "meaningful study of their relationship to job performance ability," the testing requirements "were instituted on the Company's judgment that they generally would improve the overall quality of the work force." *See* 401 U.S. at 431.

The Court did not challenge the finding below that the employer had acted in good faith, but concluded that:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. 401 U.S. at 432.

Moreover, the Court declared that, contrary to assertions of the employer, Section 703(h) of the Act [8] did not

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[7] Specifically, the tests involved in *Griggs* were the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.

[8] This section of the Act provides:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer

[Footnote continued on page6]

represent a congressional *carte blanche* to use any professionally developed ability test regardless of its impact on groups protected under the Act, but authorized only job-related tests.

Because the court of appeals had found no requirement in Title VII that employment tests be job-related, the Court went into some detail in its analysis of this issue, including reference to the legislative history of the Act. It noted that while ". . . the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color," [9] Congress did not intend to "permit an employer to give any test, 'whether it was a good test or not, so long as it was professionally designed'." [10] Based on this analysis, the Court concluded that:

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[8] [Continued]

> . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. 78 Stat. 255, 42 U.S.C. § 2000e-2.

[9] 401 U.S. at 434, *quoting* 110 Cong. Rec. 7247.

[10] *Id.* at 435, *quoting* 110 Cong. Rec. 13504. As further support for its determination that Section 703(h) authorized the use of only such tests as are demonstrably job-related, the Court noted that:

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests [footnote omitted]. The administrative interpretation of the Act by the enforcing agency is entitled to great deference [citations omitted]. *Since the Act and its legislative history support the Commission's construction,* . . . this affords good reason to treat the guidelines as expressing the will of Congress." 401 U.S. at 433-34 (emphasis added).

The Court also noted in footnote 9 that:

> The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR § 1607, 35 Fed. Reg. 12333 (Aug. 1, 1970).

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force *unless they are demonstrably a reasonable measure of job performance.* Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. *Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor,* so that race, religion, nationality, and sex become irrelevant. *What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.* 401 U.S. at 436 (emphasis added).

B. *Developments Since Griggs*

Since the *Griggs* decision was issued in March of 1971, several courts of appeal have addressed the question of how professionally developed employment tests may be shown to be "job-related," and therefore permitted by Section 703(h).[11] *Moody* v. *Albemarle Paper Company,* 474 F.2d 134 (4th Cir. 1973), reflects the Fourth Circuit's application of the principles enunciated in *Griggs.*

The decision below in this case and decisions of certain other courts of appeal have created substantial concern among ASPA members and others that employment testing is being jeopardized by unnecessary and unrealistic burdens of proof. This concern was anticipated several years ago in a Development Note in the Harvard Law Review:

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[11] *See, e.g.,* United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); and Rogers v. International Paper Company, —— F.2d ——, 9 CCH Empl. Prac. Dec. ¶ 9865 (8th Cir. 1975).

> Courts are rightly suspicious when there is evidence that the application of hiring or promotional standards has a substantial differential impact on minority employment opportunities. In such cases they should require a substantial showing by the employer that his tests are useful in predicting ability to do the job. . . . At the same time, courts should be cautious lest they require such a high degree of proof from the employer that standards which very probably are valid must be abandoned because of the impracticality of demonstrating validity.[12]

The essence of this growing concern arises from the overly rigid and literal interpretations being given to the EEOC Guidelines on Employee Selection Procedures: courts are applying the Guidelines as strict procedural requirements in situations where the Guidelines are simply inappropriate. The net result of these increasingly rigid technical requirements has been an erosion, in some instances approaching a total elimination of the professional judgment and flexibility that the process of test validation requires. For example, there has been an insistence that detailed job analyses be performed to make evaluation of job performance more "objective," and that differential validation studies be made feasible and be conducted.

ASPA also is concerned that some testing programs have been denounced on the basis of evidence that certain individuals have performed satisfactorily on the job without attaining prescribed minimum scores, despite the fact that such instances are inherent in *any* process which involves the application of probability theory, as objective employee selection techniques do.[13]

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[12] Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1166 (1971).

[13] *See* Hays, W. L., STATISTICS FOR PSYCHOLOGISTS, New York: Holt, Rinehart & Winston (1963), Chapters 2 and 3.

The present case illustrates these concerns. It represents the first decision of the Fourth Circuit on the adequacy of an employer's validation efforts. In this case, the employer, Albemarle Paper Company, attempted to comply with the *Griggs* decision by retaining an industrial psychologist to determine whether the Company's existing testing program was sufficiently related to job performance. Using a concurrent validation technique,[14] the psychologist conducted a validation study, and concluded that the tests used by the employer were valid and that they could reasonably be used to assist the employer in selecting the employees best suited for the available jobs.

After reviewing the research conducted on behalf of the employer, the court of appeals relied upon the EEOC Guidelines in holding that:

> We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, *and have been validated in accordance with EEOC Guidelines.* 474 F. 2d at 139 (emphasis added).

The first failure cited by the court was the absence of "some form of job analysis resulting in specific and objective criteria for supervisory ratings" of job performance. *Id.* at 139. In the Court's view "[t]o require less is to leave the job-relatedness requirement largely to the good faith of the employer and his supervisors." *Id.*

This position has recently been extended by the Eighth Circuit in *Rogers* v. *International Paper Company*, 9 CCH Empl. Prac. Dec. ¶ 9865 (8th Cir., January 7,

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[14] Concurrent validation is a professionally recognized validation technique which involves the simultaneous collection of test scores and job performance data on samples of current employees, and the comparison (correlation) of these two sets of scores.

1975). In *Rogers*, the court of appeals stated that "where objective criteria are employed, the EEOC Guidelines . . . *control*." (emphasis added).[15] Applying the EEOC Guidelines, the Eighth Circuit concluded that the employer had not performed adequate job analyses as required by Section 1607.5(b)(3),[16] and found the absence of "proper and careful job analyses" to be "fatal to the validation study." *Moody* v. *Albemarle Paper Co.* was cited in support of that conclusion.[17]

The Eighth Circuit also found that the employer had been deficient under the EEOC Guidelines in failing to conduct a differential validation study for black maintenance craft employees, or at least to prove that such a study was not technically feasible. The court concluded that the

> [A]bsence of differential validation and the . . . [absence of blacks] in the sample composition . . . render the study inadequate. See also *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 914; *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). 9 CCH Empl. Prac. Dec. at 6593.

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[15] 9 CCH Empl. Prac. Dec. at 6590.

[16] As quoted by the court, that section states:

> "The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. . . . Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analysis." 9 CCH Empl. Prac. Dec. at 6593.

[17] 9 CCH Empl. Prac. Dec. at 6593. While noting that supervisors had been provided with a list of specific job-related factors to be considered in rating employees under a paired comparison technique, in which each subject is rated individually in comparison with each other subject in the sample (*i.e.*, on a one-to-one basis), the court found that because "individualized analyses for each of the different jobs under consideration" had not been provided, therefore "the rating process here was still principally subjective." *Id.*

In *United States* v. *Georgia Power Co.*,[18] the Fifth Circuit for the first time gave detailed consideration to the question "left unanswered by *Griggs*: what comprises an adequate demonstration that a company's testing program satisfies the proviso of Section 2000e-2(h), as interpreted by *Griggs?*" 474 F.2d at 911. As a result of its consideration, the Fifth Circuit concluded that:

> We do not read *Griggs* as requiring compliance by every employer with each technical form of validation procedure set out in 29 C.F.R., Part 1607 [the 1970 EEOC Guidelines on Employee Selection Procedures]. Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold *they should be followed absent a showing that some cogent reason exists for noncompliance.* 474 F.2d at 913 (emphasis added).[19]

This statement of the deference to be given the EEOC Guidelines was not itself cause for concern, and there was encouraging recognition by the Fifth Circuit in *Georgia Power* that the specific guideline setting a 95% minimum level of statistical significance (and other guidelines) "must not be interpreted or applied so rigidly as to cease functioning as a guide and become an absolute mandate or proscription."[20] However, the Fifth Circuit repeated and amplified its earlier determination in *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (1971), that acceptable validation is not attained in the absence

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[18] 474 F.2d 906 (5th Cir. 1973).

[19] The court also reaffirmed its earlier conclusion in United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971), that "[c]ertainly the safest validation method is that which conforms with the EEOC Guidelines. . . ." 474 F.2d at 914.

[20] 474 F.2d at 915.

of "*empirical evidence of the relationship between test scores and job performance* [*by blacks*]." 474 F.2d at 914, *citing* 451 F.2d at 456.

While acknowledging professional disagreement as to the soundness of the hypothesis that tests which are valid job predictors for whites may not be equally valid predictors for blacks, the court said that "*the possible fair employment implications are so great as to require separate racial group validation*" as called for in the EEOC Guidelines.[21] Moreover, the court noted with approval the provisions in the Guidelines which, while allowing use of tests to continue on a "provisional" basis where differential validation is not yet technically feasible, require that "the employer *may have to alter or suspend test cut-off scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.*" 474 F.2d at 914.

The Fifth Circuit's *Jacksonville Terminal* decision, *supra*, is also noteworthy for its statement that any probability of validity for blacks comparable to that of whites "seems dubious in light of the experience of Roger Stamper [apparently a black], who achieved a relatively low score on the test but who has admittedly functioned satisfactorily as a group 1 employee."[22] This represents a fundamental misunderstanding of the nature of the prediction process, with its essential reliance on probability theory and expectancies. Specific instances of deviation from the expectancies are inherent in the concept of probability, and will occur unless probability gives way to absolute certainty—*i.e.*, unless the correlation coefficient showing the relationship between a predictor

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[21] 474 F.2d at 914 (emphasis added).

[22] 451 F.2d at 456.

and job success is 1.00.[23] Validation merely ensures that the selection device will choose a successful employee with significantly greater frequency than could be expected from pure chance. For *both* blacks and whites, there will always be high test scorers who become unsatisfactory employees, and low test scorers who become satisfactory employees. To focus upon these situations, however, would be to allow the exception to dictate the rule, and would amount to complete rejection of the best available means of selecting employees solely on the basis of qualifications.

C. *The Court Should Articulate the Broad Standards by Which Demonstrations of Job-Relatedness Will Be Reviewed*

The increasingly rigid interpretations by the courts of the Guidelines' technical standards, illustrated by the cases discussed above, fail to recognize the nature of psychological testing and research, and in particular, the purposes for and practical realities involved in the conduct of test validation research. As a result, technical requirements are being imposed which are in some situations contrary to professionally recognized validation techniques, and in others, beyond the present capabilities of industrial psychology. The EEOC Guidelines, as they are being applied, not only require organizations to meet unrealistically restricted standards for the conduct of validation studies, but also to demonstrate more than validity by meeting a "hazy" standard of utility,[24] and to prove that there is no equally valid, less discriminatory

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[23] A correlation of 1.00 indicates a *perfect* positive relationship between two sets of scores, with the scores of each individual occupying exactly the same relative position in both variables. *See* Anastasi, A., PSYCHOLOGICAL TESTING, London: The Macmillan Co., (3d ed., 1970), pp. 71-76.

[24] Harvard Note, *supra* n. 12, at 1128.

alternative. The latter burden of proof has been described as "on its face, impossible to follow." [25]

The strict application of the EEOC Guidelines which has been sanctioned in *Moody*, *Rogers*, and *Georgia Power* is producing pressures on the employment process that are contrary to the fundamental goals of Title VII; rather than encouraging the use of objective selection devices, there is mounting pressure to abandon the use of professionally developed tests and other objective selection mechanisms and resort to quota-oriented or otherwise arbitrary hiring systems. This effect is exacerbated by the absence of any workable administrative mechanism or procedure by which an employer may determine in advance whether the tests desired had been validated in a manner which would satisfy the Guidelines. The less precarious alternative—resort to subjective selection devices—would not only signify a rejection of the value of applied psychology to the employment process, but more importantly, would run counter to "the very purpose of title VII . . . to promote hiring on the basis of qualifications," which this Court recognized in *Griggs*. 401 U.S. at 434. If job qualifications are not to be disparaged, but are to be made "the controlling factor" as called for in *Griggs*, then this Court must set forth standards for reviewing the validation of employment tests which take account of the practical limitations on validation.

II. While Testing Represents the Fairest and Most Reliable Employee Selection Device Currently Available, Its Limitations Must Be Recognized

As discussed above (*see* pp. 2-4, *supra*), the use of professionally developed employment tests should be welcomed as a positive development both for equal employment opportunity and economic efficiency. As the EEOC has itself recognized:

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[25] *Id.*

> The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.[26]

The Society fully supports the position that the benefits of professionally developed tests can only be expected from demonstrably valid (*i.e.*, job-related) tests. It must be recognized, however, that the process of validating employment tests through criterion-related validation research[27] is subject to significant practical limitations. These limitations should be taken into account in formulating standards of review for test validation research.

Because of the limitations in the state of the art of applied psychology, courts and reviewing agencies should proceed with great caution to avoid unintended results and unreasonable burdens, and should be prepared to accept considerable variation in method. Although statistics play a major role in criterion-related test validation, it is a dangerous oversimplification to view this process as a strictly routine one, requiring no judgment, to be mechanically replicated in every situation. The attainment of professional acceptability in the validation

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[26] 29 CFR § 1607.1(a).

[27] Because the major administrative and judicial misunderstandings concerning test validation have arisen in regard to criterion-related validation techniques, this discussion is limited to matters affecting these techniques. It should be noted, however, that content and construct validation techniques are also acceptable methods of test validation.

of tests is not an absolute, all-or-nothing proposition. No test is either valid or invalid *per se*; rather, each test must be evaluated in the particular circumstances in which it is used, and each validation study must also be evaluated from such a perspective. As discussed above, research must be adapted to particular applications, and the researcher must be afforded sufficient latitude to devise workable research designs.

By definition, "guidelines" should be considered to be broad standards, rather than precise technical specifications to be followed in all instances. Thus, the "Standards for Educational and Psychological Tests," [28] the authoritative expression of the general rules and principles controlling test use and validation published by the American Psychological Association and cited in the EEOC Guidelines, clearly recognize that they are only research goals or ideals:

> This document is prepared as a technical guide for those within the sponsoring professions; it is *not* written as law. What is intended is a set of standards to be used in part for self-evaluation by test developers and test users. An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document. The individual standards are statements of ideals or goals, some having priority over others. Instead, an evaluation of competence depends on the degree to which the intent of this document has been satisfied by the test developer or user. (emphasis in original) [29]

The expertise of the professional industrial psychologist lies in the ability to formulate sound adaptations of

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[28] APA Standards (1974), *supra*, n. 6.

[29] *Id.* at 8.

these general rules and to execute a research design in a particular situation which most nearly conforms to these broad principles of the discipline. In contrast, the EEOC and to a disturbing degree the courts have tried to specify an overly precise methodology for the acceptable validation of all employment tests in all contexts. While some of the principles set forth in the Guidelines accurately reflect the consensus of the psychological community as to the *ideal* research design for test validation, the interpretations given to the Guidelines have reduced the wisdom of the psychology textbook to inflexible and unrealistic legal dogma. In reviewing a particular validation study to determine whether it adequately demonstrates the job-relatedness of a test, the courts and compliance agencies should expect to find wide variation in method, and should accept such variation, so long as the study under review does not disregard or clearly misapply professionally recognized standards and principles. Moreover, determinations of the adequacy of each study must be made on the basis of individualized review of the specific factual setting, with a realistic view of the practical limitations presented.

III. Proposed Standards for Judicial Review of Test Validation Studies

As indicated above, there is an urgent need for this Court to set forth standards for judicial review to be applied by the courts in evaluating an employer's demonstration of job-relatedness under *Griggs*. In this regard, ASPA submits the following principles for consideration by the Court:

—Employers should be required to demonstrate the job-relatedness of a test where significant adverse impact is found.

—Validation techniques should not be applied where they are inappropriate or technically infeasible.

—Job analysis is not necessarily a prerequisite to the conduct of a competent validation study.

—Supervisory ratings of employees' job performance are a legitimate criterion for test validation.

—The weight given to the hypothesis of "differential validity" should reflect its increasingly questionable status.

—Use of a validated test should not be challenged unless a better alternative is proven to be available.

The Society believes that the incorporation of these principles as standards for judicial review of test validation studies would greatly advance the goals of Title VII by establishing a workable framework within which the proper use of objective employment tests would be increased, and hiring based on qualifications rather than bias or guesswork would be encouraged.

A. *Employers Should Be Required to Demonstrate the Job-Relatedness of a Test Where Significant Adverse Impact Is Found*

When it is shown that tests are an operative part of an employment system which results in unfair discrimination prohibited by Title VII, it is appropriate to require that the test user demonstrate that the test is significantly related to job performance (*i.e.*, that it is valid). The job-relatedness of a test may be established by content validation (*i.e.*, a direct comparison of the content of the test and the functional content of the job), criterion-related validation (*i.e.*, an empirical demonstration of a statistical relationship between a test and a significant job behavior), or construct validation (*i.e.*, the demonstration that a human characteristic indicated

by the test is also required on the job). Any of these methods is acceptable under particular circumstances, but the methods are not completely interchangeable; if one technique is inappropriate in a given situation, the others are not necessarily appropriate.

B. *Validation Techniques Should Not Be Applied Where They Are Inappropriate or Technically Infeasible*

No single methodology for the conduct of validation studies should be imposed in all instances of test use. Validation strategies and procedures are determined by the practical realities of a particular application. Just as the use of techniques based on a well-conducted validation study in a less-than-ideal situation is better than the use of techniques unsupported by evidence of validity, so a technically inadequate validation study, or one which attempts to apply a methodology inappropriate to the particular situation, may be *worse* than no study at all. There are situations in which no validation technique may be feasible.

In determining which validation techniques are appropriate, or whether validation research is actually feasible in particular circumstances, the following factors, among others, must be considered:

—the size and characteristics of the applicant or employee sample available for study

—the type and complexity of the job in question

—the rate of change within the job

—the employer's past use of the test in question

—the availability of present employees comparable to the anticipated applicant pool

—the skill, trait or behavior to be predicted.

With regard to the conduct of criterion-related validation studies it is generally agreed within the profession

that such research is not technically feasible unless the sample to be studied is of sufficient size[30] and is composed of appropriate persons.[31] If there are not sufficient numbers of such persons available for inclusion in a criterion-related validation sample, there is *no* meaningful conclusion that can be drawn from the results. Thus, validation in such circumstances should neither be attempted nor required.[32]

C. *Job Analysis is Not Necessarily a Prerequisite to the Conduct of a Competent Validation Study*

Job analysis is the collection of job information of any type, by any means, for any purpose whatsoever. Job

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[30] "The smaller the number of cases in a validation sample, the less reliable the statistics, . . . When *N* (number of persons in sample) is very small, an obtained correlation coefficient of zero may result in the erroneous rejection of a valid test." (Material in parentheses added.) APA Standards (1974), *supra*, n. 6, at 37-38. *See also* U.S. Dept. of Labor, Office of Federal Contract Compliance, "Questions and Answers on OFCC Testing and Selection Order," Washington, D.C. (1974), question No. 26.

[31] "Appropriate persons" is generally defined as a sample of individuals doing essentially the same job and hired during essentially the same time period. *See* Blum, M. L. & Naylor, J. C. INDUSTRIAL PSYCHOLOGY: ITS THEORETICAL AND SOCIAL FOUNDATIONS, New York: Harper & Row (1968), p. 37.

[32] In situations where it is not feasible to conduct a validation study, for any of the reasons discussed above, employers should be prepared to demonstrate the job-relatedness of their tests by other evidence. Such a demonstration may be made in a number of ways such as the following:

—comparison of evidence from validation studies conducted by other employers using the test in relation to similar jobs.

—formation of a consortium of similarly-situated employers for the joint conduct of validation research.

—information from existing test literature and test publishers concerning validity data for the test with regard to the jobs in question.

analysis has no set methodology. Methods range from simple viewing of the job to interviewing supervisors or job incumbents to completing complex checklists or other rating forms.

Job analysis has no fixed content. In some cases it may involve only a collection of information about work outputs such as sales. In other cases job processes (*i.e.*, job tasks) may be of more interest than work outputs. Still, at other times, one may be interested only in the psychological or physical traits involved in doing the job.

Job analysis can serve many purposes. Its most common use by employers is in job evaluation for establishing promotional ladders and pay. Another common use of job analysis is developing training requirements. It also has some use in the test validation process. In criterion-related validation, some types of job analysis can serve as a basis for selection of experimental tests. Other types can be used as the basis for criterion development. Job analysis can also serve as the basis for the development of a test, such as a skill test, which will be evaluated in terms of its content validity.

Since criterion-related validation is the focus here, only job analysis for this type of validation will be discussed in detail. Job analysis for selecting experimental tests often involves having supervisors make ratings on the importance of various psychological traits to job performance. Job analysis of this type, however, is *not* required for a validation study to be competently done. The purpose of the job analysis in this instance is merely to attempt to limit the number of experimental tests to be studied. Other methods such as review of validation studies for similar jobs may be substituted. The measure of adequacy of a test is whether it correlates with a criterion, not whether it is based upon job analysis.

In criterion development, the type and the extent of any analyses involved depend upon the purposes of the research and the validation strategy planned. In general, the more elaborate the criterion planned the more detailed the job analysis should be. Development of a criterion such as a work sample or job knowledge test requires detailed knowledge of job duties. However, if the employer is using turnover as a criterion, no job analysis is required.[33] The employer simply has to know who stays and who leaves. Any analysis of job outputs or tasks would be irrelevant. Similarly, when the employer is using a work output criterion, such as number of letters typed per day, a knowledge of the tasks involved in the typing process, such as rolling the paper in the typewriter, is superfluous.

The role of job analysis in developing supervisors' ratings as criteria deserves careful consideration. When the purpose of conducting a validation study is primarily economic efficiency, as is the case in most employing organizations, a single overall criterion is implied. There is *one* decision to make about the job candidate, *e.g.*, to employ or not employ, and there must be *one* ultimate criterion to reflect the basis for that decision.

As Brogden and Taylor have stated:

> In job analysis for criterion purposes we believe that a clear cut distinction must be made between the end products of a job and the job processes that lead to these end products. It may be pertinent to such other legitimate objectives of job analysis as training or position classification to study the exact sequence of operations in the production of the finished product. The skills needed, the tools used, and the methods employed may all be needed for this

[33] This is contrary to 1607.5(b)(3) of the EEOC Guidelines which imply that job analysis is necessary when behaviors such as tenure are used as criteria.

> purpose. Such information does not, however, give a direct answer to the major question, 'How much does the employee produce and how good is it?' [34]

Clearly, it is possible to do a task-oriented job analysis and have supervisors rate performance on each of several tasks. However, if an employment oriented validation study is to be done, these separate ratings must be combined somehow to yield an overall rating. There are no firm rules for this combination process and it is usually subjective. In addition, although there is a logical appeal to a criterion development method involving ratings on separate tasks, it remains to be proven that it is superior to using a simple overall criterion.[35]

Job analysis, as a tool of science, has many limitations.[36] Most of these are related to the fact that any job analysis is merely the controlled use of human judgment. One of the most important limitations is that there is no way to judge the ultimate worth of most job analyses. For example, if a supervisor and a subordinate disagree on the importance of a job task, who is to say who is right? Most jobs do not lend themselves to an objective determination of such matters. Furthermore, the amount of documentation collected does not necessarily have any relationship to the worth of the analysis. A small amount of information collected from those intimately familiar with the job may be more valuable than much more information from those less familiar with the job.

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[34] Brogden, H. E., & Taylor, E. K. "The Dollar Criterion—Applying the Cost Accounting Approach to Criterion Construction," *Personnel Psychology*, Vol. 3 (1950), p. 141.

[35] Kavanaugh, M. J., "The Content Issue in Performance Appraisal: A Review," *Personnel Psychology*, Vol. 24 (1971), pp. 653-668.

[36] Schmidt, F. L. & Kaplan, L. B., "Composite vs. Multiple Criteria: A Review and Resolution of the Controversy," *Personnel Psychology*, Vol. 24 (1971), p. 419-434, which cites several studies in which an overall rating was used as a criterion against which to validate more detailed ratings.

A second severe limitation is the difficulty in translating job analysis information into a form permitting practical decisions. For example, by knowing the tasks a person does, one cannot directly determine the abilities required to perform these tasks. Subjective inferences almost always have to be made in order to apply job analysis information. Various researchers are studying methods to make job analysis more useful and alleviate some of the problems inherent in the various methods,[37] but at present it must be said about job analysis that

> No machine-like procedure of checking off one by one all possible factors has ever been found successful. Instead, the psychologist studies the task with whatever insight and psychological knowledge he can muster. Job analysis is in large measure an art.[38]

In its decision in *Moody*, the Fourth Circuit relied heavily upon Section 1607.5(b)(3) of the EEOC Guidelines to strike down the validation study on grounds of failure to perform a job analysis. 474 F.2d at 139-40. In the validation study at issue, the two primary reasons for job analysis were missing. *First*, there was no need for analysis to select trial tests. *Second*, the validation strategy involved the justifiable use of a single overall criterion to which detailed job analysis is not usually pertinent.[39]

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[37] Fleishman, E. A., Kincade, R. G., & Chambers, A. N., Development of a Taxonomy of Human Performance: A Review of the First Year's Progress, Washington, D.C.: American Institutes for Research (1968).

[38] Cronbach, L. J., ESSENTIALS OF PSYCHOLOGICAL TESTING, New York: Harper & Row, p. 325.

[39] In *Rogers*, the court based its reversal partically upon § 1607.5 (b)(3), despite the fact that the tests had been utilized prior to

[Footnote continued on page 25]

D. *Supervisory Ratings of Employees' Job Performance Are a Legitimate Criterion for Test Validation*

If the researcher has a choice, he or she should use objectively verifiable data in preference to ratings. However, it must be recognized that in most organizational settings objective data are unavailable for most jobs. Objective data which are available often deal with trival aspects of job performance, probably because it is easier to quantify the more unimportant aspects of human behavior. Also objective data are often contaminated by factors over which the employee has no control, such as the failure of a vendor to provide the appropriate material. In general, good ratings by persons well informed about the job are better criteria than trivial or contaminated data, even though they may be objectively verifiable.

The court in *Moody* looked with suspicion on supervisory ratings,[40] and failed to recognize the fact that throughout any validation process, controlled use of human judgment is always involved. It is used in designating the purposes of the study, in conducting job analysis, in developing criteria, and in selecting statistical methods. The end result of a criterion-related validation study is indeed a mathematical expression, but this ex-

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[39] [Continued]

the conduct of validation research, and the employer's expert had conducted a review of pertinent job information. The court concluded, however, that the job analysis was inadequate, apparently because it was not "a careful *quantification* of criteria that 'represent major or critical work behaviors' for the individual jobs." 9 CCH Empl. Prac. Dec. at 6594. We respectfully submit that this indicates once again an over-emphasis on empiricism and a misunderstaning of the fact that any quantification done in job analyses is generally based on assigning numbers to subjective judgments.

[40] 474 F.2d at 138-139. The Eighth Circuit in Rogers v. International Paper Company also looked with suspicion on such ratings, 9 CCH Empl. Prac. Dec. at 6593-94, and cited *Moody* as authority for doing so.

pression is based on a complex combination of mathematics and judgment.

It is recognized that ratings are less than perfect measures of human characteristics. The literature on this is extensive. In addition, while various strategies have been recommended for improving the accuracy of such ratings,[41] it must be carefully noted that ratings are subjective regardless of what operations are performed upon them in the name of objectivity. In summary, for many important aspects of behavior, ratings are not only the most reasonably available measure, but also they are the most relevant measure. In this context, the use of supervisors ratings as criteria must be considered as perfectly legitimate.

The question of bias in ratings deserves special attention. It is well known that biases of many types are associated with ratings ,but one of the problems involved in correcting for biases is that biases are usually impossible to detect. For example, one cannot automatically assume bias if there is a difference in job performance ratings for any two population subgroups. There may be real differences in their actual job performance.

A conclusive study to determine whether such actions as basing ratings on job analysis would reduce racial or sexual bias will probably never be done. There are actually severe questions as to whether the results of even laboratory studies would generalize to any real life settings. There is, however, considerable relevant research which suggests that there are few advantages in complicating rating techniques. Many techniques designed to decrease specific biases and prevent rating

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[41] *E.g.*, Guilford, J. P., PSYCHOMERTIC METHODS, New York: McGraw-Hill, (2d ed. 1954), pp. 263-301.

errors have been ineffective.[42] In addition, ratings of objective aspects of job behavior have not been demonstrably superior to ratings on more subjective aspects of performance.[43] It should also be noted that any decrease in the reliability of a rating caused by lack of specific characteristics to be rated works *against the researcher*. Since the goal of the research is the accurate determination of correlation between test scores and a criterion (*i.e.*, the rating), it is a handicap to the research if the criterion is unreliable. Correlations obtained in such situations would represent *underestimates* of validity.

Finally, supervisory ratings that are developed on the basis of detailed job analyses are no less subjective than overall ratings of job performance. The job analysis is merely the articulation of the composite views of the researcher and, more typically, the supervisors and employees. A rating scale constructed on the basis of such an analysis is merely an aggregation of subjective views on job content. The circular nature of the proposition should be apparent: a rating based on an indirect composite of subjective judgments is not necessarily more reliable than a direct composite of the judgments of the same individuals. Once again, the requirement of certain technical procedures in this area indicates an elevation of form above substance.

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[42] Blumberg, H. H.; Desoto, C. B., & Kuethe, J. L., "Evaluation of 'Rating Scale Formats' ", *Personnel Psychology*, Vol. 19 (1966), p. 243-259.

[43] Researchers' attempts to maximize reliability of their efforts by stressing the more concrete in ratings have met with indifferent success, as indicated in a thorough review of the question of subjectivity vs. objectivity in rating content. Kavanaugh, M. J., "The Content Issue in Performance Appraisal: A Review", *Personnel Psychology*, Vol. 24 (1971), p. 653-668.

E. *The Weight Given the Hypothesis of "Differential Validity" Should Reflect Its Increasingly Questionable Status*

"Differential validity" is a term used to describe the hypothesis that there may be differences in the relationship between test scores and job success among identifiable subgroups. Under this theory a single test may possess significantly different levels of validity for blacks and for whites, or for males and females. Differential validation, however, is becoming a less viable proposition within the profession of psychology,[44] and most recent studies have raised severe doubts as to the soundness of the hypothesis. As early as 1969, a report sanctioned by the American Psychological Association concluded:

> This hypothesis, that test scores have different meanings for different subgroups, requires extensive research for confirmation and rejection; existing evidence is inadequate to determine whether aptitude tests actually discriminate unfairly because of their different validities from one subgroup to another.[45]

Since the APA's admonition that further study was needed before this concept could be either accepted or rejected, several new developments have occurred. *First*, differential validation was written into the EEOC Guidelines as a standard to be followed whenever possible.

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[44] APA Standards (1974) pp. 43-44.

"Unless a difference is observed on samples of substantial size, and unless there is a reasonably sound psychological or sociological theory upon which to explain an observed difference, the difference should be viewed with caution . . . . Users should be aware, however, that a too-hasty acceptance of bias or of differential validity, if used in decision-making, may be as likely to produce uni test use as is failure to consider the possibility."

[45] APA Task Force on Employment Testing of Minority Groups, Job Testing and the Disadvantages, 24 *Am. Psych.* 637, 641 (1969).

See 29 CFR § 1607.5(b)(5). *Second*, several major reviews of numerous research projects have been published which conclude that tests shown to be valid for the majority group can be expected to be valid for a minority group as well.[46] In a recent analysis of twenty differential validation studies Ruch concluded:

> "If one reads only the conclusions in published articles and monographs, it would seem that differential validity occurs with high frequency . . . If one analyzes the data carefully, however, the evidence for a substantial amount of differential validity evaporates. The seeming high frequency of its occurrence is an artifact of the erroneous statistical logic described earlier." [47]

While acknowledging evidence refuting the notion of differential validity, the Fifth Circuit in *Georgia Power* stated that "the possible fair employment implications are so great" as to require differential validation pursuant to the EEOC Guidelines.[48] The court's decision that every unnecessary barrier to minorities be removed is understandable. Nevertheless, further attention needs to be given to what legal requirements, if any, should be imposed on the basis of this increasingly questionable hypothesis.

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[46] *See* Schmidt, F. L., Berner, J. G., & Hunter, J. E., "Racial Differences in Validity of Employment Tests: Reality or Illusion?" *Journal of Applied Psychology* (1973); Boehm, V. R., "Negro-White Differences in Validity of Employment and Training Selection Procedures," *Journal of Applied Psychology* (1972).

[47] Ruch, W. W., "A Re-analysis of Published Differential Validity Studies," American Psychological Association Symposium on "Differential Validation under EEOC and OFCC Testing and Selection Regulations," September 6, 1972 (aavilable on request). *See also*, Campbell, J. T. "An Investigation of Sources of Bias in Job Prediction, A Six Year Study," Educational Testing Service, Princeton, N. J. (1973); Note, Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. at 1129 (1971).

[48] 474 F.2d at 914.

Certainly use of validated tests should not be suspended—for blacks or whites—pending the attainment of feasible conditions for a differential validation study. Moreover, given the lack of evidence supporting differential validation, use of validated tests should not be conditioned on lowering cut-off scores simply to make such a study more feasible.[49] Such a requirement necessarily forces the employer to make selections on the basis of more arbitrary and generally more subjective standards. Instead, employers should be allowed to set and maintain job-related qualifications as high as they choose, as Congress intended[50] and as this Court recognized in *Griggs*.[51]

F. *Use of a Validated Test Should Not Be Challenged Unless a Better Alternative Is Proven to be Available*

When a validation study has demonstrated that a test bears a significant relationship to important requirements of the job(s) for which it is used, the employer has met his burden of showing job relatedness under *Griggs*. However, the EEOC Guidelines would pose two additional requirements which could operate to bar the use of even validated tests. First, the Guidelines require, in addition to a demonstration of job-relatedness, a showing of a "high degree of utility," including a showing that the test has "practical significance or usefulness." 29 CFR §§ 1607.3, 1607.5(c)(2).[52] In addition, the Guidelines would require evidence of the "unavailability

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[49] Section 1607.9 of the EEOC Guidelines suggest such a "lowering of qualifications" in order to facilitate study. This approach was cited approvingly in *Georgia Power*, 474 F.2d at 914.

[50] *See* remarks of Senators Case and Clark, 110 Cong. Rec. 7247.

[51] *See* 401 U.S. at 436.

[52] Moreover, the *Rogers* decision appears to endorse such a requirement, even though the discussion set forth under the heading "Utility of the Test" does not address utility *per se*.

of" suitable alternative selection procedures. 29 CFR § 1607.3.

ASPA submits that neither of these requirements is necessary to the determination of job-relatedness required by *Griggs* and that both serve as deterrents to the use of validated employment tests. While elaborate mathematical formulations have been developed to identify utility,[53] the determination of what is acceptable usefulness remains a wholly subjective consideration. Moreover, it must be remembered that a test which is "valid" is, by definition, *useful* in selecting employees likely to be successful. A test with demonstrated validity must be considered to be superior to any selection device which has not been shown to be valid.[54] However, the EEOC Guidelines, which generally require carefully developed and objective support for each element of the validation process, would forbid the use of a valid test wholly on the basis of a subjective evaluation of its usefulness.

In addition, the requirement of demonstrating the absence of alternative procedures places on the employer the impossible burden of proving a negative. If employers are required to search for alternatives to a demonstrably valid procedure, the process would become so burdensome and never-ending that objective testing could be severely restricted. ASPA does not contend that it would never be appropriate to enjoin the use of a validated test. If a readily identifiable and clearly applicable alternative selection technique of equal validity is proven to have a significantly less adverse effect on minorities than the technique used by the employer, it would be reasonable to require the use of the technique having

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[53] *See* 29 CFR § 1607.8(c)(2).

[54] *See Georgia Power*, 474 F.2d at 914, 917.

the significantly less disparate impact.[55] However, in the absence of proof that such an alternative exists, it seems equally reasonable to permit an employer to continue to use a validated test without requiring continuing efforts to explore the validity of other selection devices.

IV. CONCLUSION

The American Society for Personnel Administration believes that administrative and judicial scrutiny of the methods used by industrial psychologists to develop and apply objective aptitude and ability tests has become so rigid that even the most diligent professional will often be unable to satisfy the requirements imposed and that, as a consequence, many employers will be forced to abandon objective selection techniques altogether, or to hire on a quota-like basis which avoids the appearance of disparate effect. ASPA respectfully submits that the Court, whatever its holding in the present case may be, should continue to recognize the importance of objective selection techniques to the attainment of the objectives of Title VII.

ASPA further believes that both courts and agencies need assistance in formulating the standards of job-relatedness. In practice this need has been filled by reference to either the Guidelines on Employee Selection Procedures, issued by the EEOC—which do not accurately reflect a professional consensus on technical standards for the conduct of validation studies—or the APA's Standards for Educational and Psychological Tests—

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[55] This view is consistent with the conception of the burden of proof in other Title VII cases. While a demonstration of job-relatedness through a validation study meets a employer's burden under *Griggs*, a showing of a valid, available, and less disparate alternative could be viewed as establishing that the use of the existing test, though valid, was a pretext for discrimination. *Cf.*, Green v. McDonnell Douglas Corp., 411 U.S. 792 (1973).

which were never intended to be applied as standards for legal review of acceptability. For this reason, this brief has attempted to set forth standards which would be suitable for legal acceptability.

The discipline of applied psychology, in its work of evaluating and predicting human behavior, is simply not amenable to hard-and-fast formulas and rigid procedures. Thus, even under the standards offered herein, acceptability must not be deemed an all-or-nothing proposition, but must be evaluated and adjudicated on the basis of a thorough consideration of all the facts and circumstances of a particular case and in light of the available alternatives.

Respectfully submitted,

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